

This record is a partial extract of the original cable. The full text of the original cable is not available.

C O N F I D E N T I A L SECTION 01 OF 02 THE HAGUE 001546

SIPDIS

DEPARTMENT FOR S/WCI - PROSPER/MILLER, EUR - BOGUE, EUR/SCE
- JONES/GREGORIAN, L/EUR - LAHNE, INR/WCAD - SPRIGG

E.O. 12958: DECL: 1.6 FIVE YEARS AFTER CLOSURE OF ICTY

TAGS: [PREL](#) [PHUM](#) [BK](#) [HR](#) [SR](#) [NL](#) [ICTY](#)

SUBJECT: ICTY: CROSS-BORDER PIFWC APPREHENSIONS GET A GREEN
LIGHT

REF: A. (A) 00 THE HAGUE 1247

[1](#)B. (B) 02 THE HAGUE 2940

[1](#)C. (C) THE HAGUE 1510

Classified By: Legal Counselor Clifton M. Johnson per reasons 1.5(b) and (d).

[1](#)1. (SBU) Summary: The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed on June 5 that the Tribunal has jurisdiction over indictee Dragan Nikolic, who has claimed since his arrest in April 2000 to have been detained unlawfully by SFOR (refs A and B).

In its opinion, the Tribunal recognized that cross-border apprehensions of alleged war criminals without the consent of the host state may be acceptable (at least relative to ICTY jurisdiction), "particularly when the intrusion occurs in default of the State's cooperation." While this ruling provides greater latitude for persons-indicted-for-war-crimes (PIFWC) apprehension efforts, it also places a marker that the Court will continue to carefully review allegations "that the rights of the accused were egregiously violated in the process of his arrest." End summary.

[1](#)2. (U) In April 2000, SFOR apprehended Dragan Nikolic, indicted for crimes against humanity and war crimes for his role as commander of the Susica detention camp in Northeastern Bosnia (ref a). Nikolic's counsel claimed that he was forcibly and illegally abducted from his home in Serbia. For the limited purpose of resolving whether the circumstances of his arrest could divest the ICTY of jurisdiction, the Prosecution and Defense agreed to a stipulated set of facts suggesting that Nikolic's apprehension was forcible and, in some respects, harsh. The trial chamber noted that the Prosecution and Defense agreed "at least" that the accused was forcibly taken from his home in the Federal Republic of Yugoslavia (FRY) by unknown individuals having no connection with SFOR or the Tribunal. Further, Nikolic asserted that he was transported to Bosnia in handcuffs in the trunk of a car. The court did not question those facts and sought no testimony as proof of them. Last October, the trial chamber rejected the defense's main claims that the ICTY lacked jurisdiction because, one, Nikolic's abduction from Serbia was a violation of FRY sovereignty, and two, he was mistreated during the arrest and initial detention (ref B). The appeals chamber upheld the trial chamber decision.

[1](#)3. (SBU) Two aspects of the opinion are noteworthy. First, after finding support that state courts are likely to place great weight on the nature of the offense at issue when cross-border apprehensions are challenged, the appeals chamber notes that "the damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation." In a forward-leaning statement of ICTY judicial policy, the Appeals Chamber says that it "does not consider that in cases of universally condemned offences (i.e., genocide, crimes against humanity, war crimes), jurisdiction should be set aside on the ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organization involved." Further, "the exercise of jurisdiction should not be declined in cases of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State, or an international organization, or other entity, do not necessarily in themselves violate State sovereignty." Even assuming intrusive action by the captors that could be attributed to SFOR, the chamber found "no basis, in the present case, upon which jurisdiction should not be exercised."

[1](#)4. (SBU) Second, it is clear that the Tribunal -- especially absent stipulated facts as in this case -- will review allegations of mistreatment during apprehension and detention. This could involve requests to hear testimony of or obtain statements from those involved in apprehensions, a

risk that is significantly increased when the Office of the Prosecutor (OTP) has been involved closely in those efforts. At the same time, however, the decision suggests strongly that an accused must show a very high level of abuse in order to deprive the Tribunal of jurisdiction. The trial chamber had noted that "in a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused." The appeals chamber cited this language approvingly, though it may have sown some confusion by suggesting that the standard is whether "the rights of the accused were egregiously violated in the process of his arrest." Whether there is any light between "very seriously mistreated" and "egregiously violated," the clear conclusion that may be drawn is that, except in very grave cases of mistreatment, the Tribunal is unlikely to divest itself of jurisdiction over an accused.

15. (SBU) That said, the appeals chamber hints that in a case where the mistreatment of an accused or violation of state sovereignty reaches a very high degree of seriousness, it will "determine whether the underlying violations are attributable to SFOR and by extension to the OTP." In other words, even if the misconduct is carried out by persons other than SFOR/KFOR or OTP, the Tribunal may look to determine whether that misconduct is attributable first to SFOR or KFOR and second to OTP and could therefore deprive the ICTY of jurisdiction. Neither the appeals nor trial chambers found it necessary to address when such attribution would be possible, but the trial chamber's more expansive opinion leaves open the possibility that SFOR or KFOR involvement in an unlawful apprehension or detention -- such as procuring others' illegal actions or carrying them out directly -- could bring into question the Tribunal's jurisdiction.

16. (C) Comment: The appeals chamber has handed OTP and SFOR an important victory that closes the chapter on Nikolic's apprehension. Perhaps more important, however, it highlights the importance the chambers attach to apprehensions of PIFWCs -- essentially, it says that the importance of apprehensions trumps state sovereignty concerns. This is a remarkable statement for the Tribunal to make and may be seen as a green light for the international community to take aggressive action to capture fugitives. (NB: The tone and substance echo comments Embassy legal officers have heard directly from President Theodor Meron (American), who signed the opinion.) There is a caveat, of course; a complaint by a state concerned could weigh against the legitimacy of a cross-border apprehension. But even in such a situation the Tribunal suggests that the value of international justice is more important than such a limited injury to state sovereignty. We also see this statement of the chamber as another signal of cooperation issues moving into the judicial sphere (ref c).

17. (C) Comment, cont'd: It should also be recognized that the Tribunal keeps open the possibility that indictees in custody may challenge the means by which they were apprehended and, in the most serious cases, potentially gain release. We suspect that few cases, if any, will lead a chamber to find that it lacks jurisdiction over an accused. However, in cases where OTP and the defense cannot agree to stipulated facts (as they did here), trial chambers dealing with challenges to the circumstances of an arrest are likely to feel it necessary to explore the details of apprehensions. In such cases, the more the apprehension effort is intertwined with the OTP, the greater the risk that apprehension forces may be asked to explain to the court the circumstances of the arrest. End comment.
SOBEL